Central Law Journal.

ST. LOUIS, MO., SEPTEMBER 25, 1914.

SOME SIDELIGHTS ON A TRUST.

The success of anti-trust acts is very beautifully exemplified in the case of Attorney General v. National Cash Register Co., 148 N. W. 420, decided by Supreme Court of Michigan.

How very independent of the law some twenty odd years ago did trusts feel themselves to be and how futile did they regard statutes and decisions of courts to arrest their efforts to crush out competion is shown by the documentary evidence in this case, taking it, that the trust involved was no mean representative of its kind.

And further along this evidence shows what a change has come over the spirit of their dreams.

This trust was proceeded against as a foreign corporation organized to maintain a monopoly in that state, and as earmarks of its intent in this direction its general history in the past was looked into, no doubt upon the theory of *omnia presumuntur contra spoliatorem*, or, as anglicised, "the leopard cannot change his spots."

This history shows that in 1890, just prior to the national anti-trust act being adopted, in answer to agitation for relief against monopoly, this trust avows itself to be a monopolist and tells its agents that "monopolists can pay good salaries and hire the best men," and "by fighting opposition and forcing them down by legal right we can maintain prices that are consistent with the finest class of workmanship." It further tells them: "That monopolists are the very best possible concerns to be associated with is a fact beyond dispute," and: "that we mean to be the only manufacturers in our business we have shown by our legal fights for our rights."

The next year when the anti-trust act had become a law its president tells its agents that: "Prices of registers must be kept up by knocking competitors down. Hereafter my whole time will be devoted to this business exclusively," and he then proceeds to tell how he will attend to this business.

Before that he said that: "In this fight against competition for our bread and butter we will never ask for or give any quarter. It is a fight to the death: We make the fight against competition a personal affair. We wish our agents would do the same. We think self-respect demands it. We would not speak to an agent of competitors. We ask you not to recognize as gentlemen in any way the agents of opposition companies."

As we understand this he was organizing a band of *chevaliers d'industrie* that was to claim an aristocracy for themselves in their plunder of the public.

But he proceeds until he rises to a climax, in the next year, as follows: "If necessary, we will spend five times as much money as we have already done in order to down opposition. If they really believe this they will throw up the sponge and quit. * * * General Butler said to us, four years ago, that we had an unusually fine prospect. 'The only way to make money out of it,' said he, 'is to fight. If you get whipped in one court, carry it to a higher court, and if you get whipped finally in the superior court, commence all over again in a new case and fight. Never compromise and never buy out. It is more expensive, probably for a year or two, to fight, but as soon as the opposition know that you will fight at every point, regardless of the money it takes, they will let you alone.' General Butler was prominent in war, politics, business and law. We have taken his advice and propose standing by it, if it takes every dollar we have."

What a commentary is here upon such legislation, as merely imposes a fine for the violation of anti-trust laws! And what

a criticism is it upon business, that it will gather together the young men and old, that work for it, into a band of accomplices and abettors in the violation of law, because by so doing there may be built up such a reputation as a law-defying aggregation that opposition to them "will throw up the sponge and quit."

But we said that these people pursuing this policy were visited by a change in the spirit of their dreams. Thus in 1909 we find it advising all of its district managers that: "The newer members in the districts are not thoroughly clear on the best way to handle sales made by other companies. Please see that every agent in your district thoroughly understands our position in the matter. You know what this policy is, but in brief will say that in no case will we permit any of our agents to misrepresent cash registers manufactured by other companies, neither will we permit any purchaser of a cash register of any other company to break his contract and return his register to the manufacturer. * * * Please see that these instructions are carried out in every detail and that the new men are so instructed on entering the field."

Considering how rampant this company had been, it occurs to the court that there may be some lack of candor in this letter and it says: "It is significant that at that late day it became necessary to write such a letter at all," and "there was much evidence of subsequent conduct of salesmen along the old lines of objectionable practice." Perhaps there would have been a great deal more but for the slyness of all of the salesmen. It is also significant that there is no report of discharge from employment for disobedience of instructions.

The chapter upon which these sidelights are thrown reveals a course of conduct exhibiting a low morality. It may be reconciled to the satisfaction of those, who perpetrated these acts, as being allowable in a fierce war of competition, restrained or attempted to be restrained only by commands as to the things merely *mala prohibita* and not *mala in se*.

But when conspiracy is based on the theory of violation of solemn enactments to subserve the general good, there seems to be involved something different than the mere shooting of a bird in the closed season or seining for fish less than the statutory size, where this is the independent act of an individual. The conspiracy is an attempt to overturn law and secure an illegitimate advantage over those who obey its commands. When this course is resorted to by a powerful business agency constraining employes to participate therein, it becomes all the worse and lowers their own sense of fidelity and honesty in employment. It, indeed, amounts to a scandal tending to undermine moral character. If in the business world there are powerful agencies that will do these things, the heavy brand of personal punishment is the only remedy that may be supposed to be adequate.

NOTES OF IMPORTANT DECISIONS

INSURANCE — INDEMNITY COMPANY KEEPING FAITH WITH ASSURED.—In 78 Cent. L. J. 181, 235, 320 and 392, we treat the question of an indemnity company's obligation to an assured fairly and fully to protect him to the extent of the amount insured and to go even beyond that amount so far as costs and interest is concerned.

The principle in the case of Brassil v. Maryland Casualty Co., 210 N. Y. 235, 104 N. E. 622, which we discuss at page 235, *supra*, is applied by New York Supreme Court in Appellate Division in Upton Cold Storage Co. v. Pacific Coast Casualty Co., 147 N. Y. Supp. 765.

This case shows a suit for money paid upon three judgments, and fees attending levy, against assured. In one of the cases there was issuance of execution upon failure of defendant in the case to give a supersedeas bond and the other two judgments were for surgeons' charges for relief to employes dangerously wounded. The first judgment was obtained after resistance made by the Casualty

Company, and its causing plaintiff to take an appeal but giving no bond in the case. In the surgeons' cases the company was notified but refused to defend.

The company's defense to recovery on the first judgment was that there was no final judgment, because there was an appeal pending, but the court applying the good faith rule announced in the Brassil case, said: "Plaintiff was left exposed by defendant's omission in conducting its appeal to the hazard of loss and expense to it, if execution were issued on the judgment. * * * When the levy under execution was discharged by plaintiff, the judgment then was final within the meaning of the policy, because it had finally resulted in loss and expense to the plaintiff which its policy covered."

As to the surgeons' bills allusion is made to the duty of plaintiff to render at all times all co-operation and assistance within its power. It was said: "Discarding from our consideration all promptings of humanity, which may reasonably have been within the contemplation of the parties in making the agreement, it would seem the language of the policy above referred to expressed the intention of the parties that plaintiff agreed, in the event of an accident covered by the policy, to render such immediate assistance to the persons injured thereby as might reasonably be required to minimize the resultant damages, which defendant might ultimately be liable to pay. * * * In such case the plaintiff was fairly required by its agreement to secure the proper medical treatment."

This seems quite a neat way to construe the co-operation clause referred to, and it ought to be sustained upon the theory, that anything tending to interfere with relief to employes could not be supposed to be intended and, really, as contrary to public policy to be intended.

Another thought here occurs with reference to these surgeons' bills. Plaintiff had to stand suit upon them to raise a liability against defendant. The policy with the defendant, therefore, directly fostered litigation. But plaintiff did not have to go to the end of all remedies to make his claim against defendant good. He was not obliged to appeal. We think, that as insurer's contract made a mere interloping between these surgeons and the plaintiff, the latter should have been allowed to settle with the surgeons, when defendant refused to defend. If insurer had the right to settle without consent of insured, why did not insured have the same right, where insurer tried to wash its hands of the whole affair?

DOMICILE — WIFE LIVING SEPARATE AND APART FROM HER HUSBAND.—It was held so far as the Transfer Tax Law of New York is concerned, but with no special reference to the terms of that law as differentiating the question upon general principle, that a wife may by simply living apart from her husband, whose abode she has left without any statement as to her intent in leaving, acquire another domicile than his. In re Crosby's Estate, 148 N. Y. Supp. 1045.

The facts in this case show the husband at one time governor of Montana, his wife residing there with him. While he was such governor she went to New Jersey where she lived for a number of years alone, and removed from there to West Virginia, where she lived apart from her husband a number of years until her death. The husband was at her house only upon one occasion to be present at the marriage of his daughter. In all the separation lasted 26 years.

The court speaks of there being no judicial decree for a separation, nor any evidence to show the husband guilty of any misconduct entitling the wife to such a decree, and there was no proof of any agreement to separate, but there is proof of the fact of actual separation.

The court said: "It would seem to be subordinating substance to mere form to hold that a separation which lasted 26 years, although not evidenced by a judicial decree, should be less effective in according the wife the right to acquire an independent domicile than if such agreement had been incorporated in a formal written instrument. The publicity incident to a judicial separation might well induce a woman of delicacy and refinement to refrain from applying for it, but when the separation is as effectual as if a judicial decree had directed it, she shou'd not be deprived of the right to acquire an independent domicile merely because she refrained from applying for a judicial decree of separation.

This sort of ruling is what contributes to the uncertainty of legal principle. But it may be all right, so far as the imposition of a transfer tax is concerned, a sort of legislation that concerns *bona fide* domicile in another state than that where real residence exists. Had the court have enforced some distinction of this kind it would have been unnecessary for it to have spoken so broadly about the right in one to acquire a separate domicile, when after her death there is merely a question of escape from taxation, a something about which one might hardly be supposed to have been influential in shaping her conduct.

THE MORE COMMON DEFENSES IN ACTIONS TO ENFORCE OBSERVANCE OF RESTRICTIVE COVENANTS ON THE USE OF REAL PROPERTY.[1]

General.—When equitable as distinguished from legal relief is sought, equitable as distinguished from legal defenses have to be considered. The conduct of a complainant may disentitle him to relief; his acquiescence in what he complains of, or his delay in seeking relief, may be sufficient to preclude him from obtaining it. And before granting equitable relief, courts of equity look not only to the words of a covenant, but to the object to attain which it was entered into, and if, owing to circumstances which have occurred since it was entered into, such object cannot be attained, equitable relief will be refused.

If the enforcement of the observance of a restrictive covenant would work injustice or be ineffectual of any meritorious result, equitable relief will be denied. If, from all the evidence, it appears that it would be against equity to enforce the restriction by injunction, relief will be denied, and the party seeking the enforcement will be left to whatever remedy he may have at law.[2]

Speaking generally, however, in the enforcement of restrictive covenants the court has no discretion to consider the balance of convenience or matters of that nature, but it is bound to give effect to the contract between the parties, unless the plaintiff seeking to enforce the covenant has by his own past conduct, delay, laches, or the like, disentitled himself to sue; that is to say, has raised against himself a personal equity.[3]

So, too, mere pecuniary loss to the defendant will not prevent a court of equity from enforcing observance of the restriction.[4]

Abandonment.—Among the equitable grounds which the courts have declined to interfere by injunction in cases in which it was sought to enforce the observance of restrictive covenants, is that of abandonment, brought about or participated in by those who were seeking to enforce the covenant.

Where the owner of a number of lots facing on the same street conveyed several of them to different purchasers subject to a restrictive covenant that no building should be erected thereon nearer than twenty-five feet to the street, and immediately thereafter the grantor and all of the grantees of such lots erected buildings within fifteen feet of the street, it was held that this was sufficient to show a complete abandonment of all the rights under the covenant, and that, therefore, one owner of a lot could not be restrained by another owner of a lot from erecting a building within five feet of the street.[5]

The principle asserted in such cases is that it would be inequitable to give to the plaintiff the benefit of the covenant which, by his conduct, he has seen fit to treat as void. It is obvious that the doctrine is in the nature of an equitable estoppel arising from the conduct of the complaining party. In view of the fact that other persons are likely to be lead into violations by the conduct of the covenantee, equity requires diligence on his part if he would seek its preventive aid.

The right to enforce a restrictive covenant has been held to be wholly extinguished by non-user for twenty years, in view of the fact that the land subject to such restriction was used in a manner inconsistent with the existence of the restriction.[6]

(1) This article does not deal with questions of the violation of covenants, or what constitutes violation of particular covenants.

(2) Ewertsen v. Gerstenberg, 186 Ill. 344, 57 N. E. 1051, 51 L. R. A. 310.

(3) Osborne v. Bradley (1903), 2 Ch. 446, 89 L. T. Rep. 11.

(4) Johnson v. Robertson (Ia. 1912), 135 N. W. 585.

(5) Scharer v. Pantler, 127 Mo. App. 433, 105 S. W. 668.

(6) Smith v. Price, 214 Mass. 298, 101 N. E. 370.

Abandonment of General Plan of Improvement.—The mere fact that a number of houses have been erected in violation of a building restriction imposed on all of the lots in a sub-division, does not show a general abandonment of the scheme of improvement.[7]

In a district containing one hundred and fifty lots which was restricted to exclude flat buildings, two flat buildings were erected covering four lots some eight or ten years prior to the time in question and at a time when none other of the present owners of lots had purchased. Held, that such fact did not show an abandonment of the restriction, and that such owners were not precluded from enforcing the restriction against another breach on different premises.[8]

The owner of unimproved property divided it into lots, his "plan" being to sell the lots only for residence purposes. He sold several lots to A., the deed to which provided that "no business, manufacturing or other than dwelling houses shall be built upon said property." Subsequently he sold lots to other persons without restrictions. A railroad company purchased A's. lots and commenced the erection thereon of a railway station, and the original owner brought suit to enjoin the violation of the covenant. Held, that by selling the remainder of the lots without restrictions, he had put it out of his power to carry out his plan of using the property for residences only, and that it was evident that he had abandoned his original intentions, and therefore, he could not maintain the action.[9]

Lots in a neighborhood were conveyed subject to a restriction that no building should be erected nearer than twenty feet to the street line. More than one hundred and fifty conveyances were made with this restriction, but subsequently about one hundred of the purchasers had violated the restriction. Nothing was done to enforce observance of the restriction, except that in 1898 a bill was filed seeking to enforce observance thereof, but it was allowed to remain without trial until 1905, at which time suit was brought to enforce the restriction against the defendant. Held, that the facts showed an abandonment of the original plan, and barred complainant of his right to enforce the restriction.[10]

In a general or neighborhood scheme, the burden follows the benefit. It is a mutual benefit accruing to all and to each which makes it inequitable to anyone so benefitted to repudiate the burden to the injury of the others. If, therefore, the parties in interest, by express act or passive acquiescence, permit such violations of the plan or scheme as destroy, wholly or partly, the benefit therefrom, they have to a corresponding extent absolved each other from its burden.[11]

Acquiescence in Immaterial Violations as Amounting to Abandonment.—Acquiescense in immaterial violations of restrictions does not necessarily show an intention to abandon a general plan of improvement, and is no defense to an action brought to enforce the observance of such restrictions. The violation, to indicate an intention to abandon the general plan or scheme of improvement, must ordinarily be material and such as to prevent the general plan relating to the restricted territory from being carried out, or at least, to prevent the plan relating to that particular portion of the restricted territory from being carried out. The materiality of the violation is to be determined from the circumstances of each case.

An open piazza, with slender columns at the corners, and enclosed for a space of about three feet at the bottom, and project-

(7) Waters v. Collins (N. J. Eq. 1895), 70 Atl. 984.

(8) Thompson v. Langan (Mo. App. 1913), 154 S. W. 808.

(9) Duncan v. Central Passenger R. Co., 85 Ky. 525, 4 S. W. 228.

(10) Chelsea Land & Imp. Co. v. Adams, 71 N. J. Eq. 771, 66 Atl. 180.

(11) Sanford v. Keer (N. J. Eq. 1912), 83 Atl. 225.

ing from the second story of a dwelling a few feet beyond the line to which building was restricted, has been held to be an immaterial violation of the building line restriction.[12]

A few sporadic instances of the violation of restrictions imposed under a general plan, which violations have not been attacked, do not, in themselves, furnish conclusive evidence of an abandonment of the plan.[13]

It has been held that the fact that complainant and other owners of property within a restricted district have erected verandas, porches, and steps within the portion of their lots restricted against buildings, which have not materially interfered with or obstructed the right of view, was not sufficient, as a matter of law, to show an abandonment of the scheme of restriction, it not appearing that there had been a general change in the street, or the conditions surrounding it, rendering the restriction useless to the complainant and other residents.[14]

Acquiescence in Violations Not Affecting Complainant's Interests, as an Abandonment.—A complainant cannot be charged with having abandoned his rights under a restrictive covenant because he failed to interfere to enforce the covenant in a case in which he had no substantial interest to protect.[15]

In the case last cited it appeared that ten buildings had been erected in violation of restrictions imposed on property in a district in pursuance of a general plan, but only two of the buildings were within two blocks of plaintiff's property. It was held that plaintiff could not be charged with an abandonment of his right to enforce such restrictions.

A town site proprietor owning lots in various parts of an improved tract of land, may be directly interested in violation of restricted covenants imposed on such lots in any part of the entire tract, and acquiescence on his part may appropriately deny to him the equitable right to enforce the covenants, but a violation of such covenants at a point on the tract distant from the lot of an individual owner may be of no interest whatever to such owner, and cannot appropriately call for affirmative action on his part.[16]

The English cases, as well as the American, generally hold that a person entitled to enforce restrictive covenants may take no notice of violations not especially offensive to him without losing the right to enforce the restrictions in case of an especially offensive violation.[17]

Abandonment of One Restriction as Abandonment of Others.—Acquiescence in the violation of one of a number of restrictions imposed on the use of property does not necessarily show an intention to abandon rights under another of such restrictions.

Where a covenant provided that no building should be erected within twenty feet of the front line of the property, nor within five feet of the side line of any lot, violations of the restriction relative to the side line of the property acquiesced in by complainant, did not show an abandonment of his rights under the restriction relating to the front line of the property.[18]

It has also been held that a restriction may be abandoned as to part of a tract of land and enforced as to the balance.[19]

Estoppel.—Speaking roughly, the principle of estoppel applicable in defenses to actions to enforce observance of restrictive

(12) Morrow v. Hasselman, 69 N. J. Eq. 612, 61 Atl. 369.

(13) Compton Hill Imp. Co. v. Strauch, 162 Mo. App. 76, 141 S. W. 1159.

(14) Seawright v. Blount, 139 Ga. 323, 77 S. E. 152.

(15) Brigham v. Mulock Co., 74 N. J. Eq. 287, 70 Atl. 185.

(16) Bowen v. Smith (N. J. Eq. 1909), 74 Atl. 675.

(17) Johnson v. Robertson (Ia. 1912), 135 N. W. 585.

(78) Brigham v. Mulock Co., 74 N. J. Eq. 287, 70 Atl. 185.

(19) Ewertsen v. Berstenberg, 186 Ill. 344, 57 N. E. 1051; Thornton v. Morris (N. J. Eq. 1910), 75 Atl. 757.

covenants, may be stated to be that, where one person by his acts or words knowingly induces another to assume burdens which he would not otherwise have undertaken, the former person is estopped to take position or do acts to the prejudice of the latter that are inconsistent with the acts or words relied upon.[20]

However, mere silence or inaction on the part of a complainant in an action to enforce observance of restrictive covenants cannot amount to an estoppel, except where such silence or inaction amount to fraud.[21]

The owner of a lot contemplated erecting a dwelling thereon for his own use, but before fixing the location thereof he consulted the owner of adjoining premises as to the probable use of such premises, and was assured by the owner that the premises would not be used for a wagon yard or feed stable. Relying upon these representations, the owner erected a dwelling at considerable cost. Subsequently the adjoining owner threatened to erect a feed stable and wagon yard on his premises within sixty feet of the other's dwelling house. This would, according to the statement of the latter, render his home unfit for habitation. In an action brought to restrain the adjoining owner from erecting the feed stable and wagon yard it was held that the acts of the latter clearly constituted an estoppel *in pais*.[22]

Of course, there can be no estoppel invoked against a complainant, unless there is proof that he had knowledge of the violations of the covenants which are set up as constituting an estoppel.[23]

Waiver.—It has frequently been held that acquiescence may often operate as a waiver of the right to enforce covenants restricting the use of property without any physical change of a permanent nature having occurred in the property. But in all such cases it will probably be found that such substantial changes have been committed in the special conditions sought to be preserved by the covenant as to clearly indicate an intention on the part of the person entitled to enforce the covenant to relinquish the original purpose or scheme defined by the covenant, or that adverse equities have intervened by reason of failure to enforce the covenant.

Waiver is the intentional relinquishment of a known right, involving both knowledge of the existence of the right and an intention to relinquish it.[24]

In Massachusetts it is held that a plaintiff is not prevented from obtaining relief against the violation of property restrictions by the fact that he has not objected to a violation of the restrictions by some one in the neighborhood other than the defendant.[25]

Waiver of a right to the enforcement of restrictions contained in a deed may be shown by parol testimony,[26]

Illustrations.—The lots of adjoining owners were subject to restrictive covenants prohibiting any building from being erected nearer than ten feet of the street line. One of the owners commenced the erection of a building with eaves and bay windows projecting into the restricted portion of the lot. The other owner notified him that he considered the erection of the bay windows in such a manner a violation of the covenant, but made no other objections, and the building was erected with the bay windows eliminated and the eaves projecting over the building line. Held, that under the circumstances the plaintiff, owner of the adjoining lot, was not entitled to an injunction to require the removal of the eaves projecting over the building line, as the defendant was warranted in proceeding

(20) Woods v. Lowrance, 49 Tex. Civ. App. 542, 109 S. W. 418.

(21) Miller v. Klein (Mo. App. 1913), 160 S. W. 562.

(22) Woods v. Lowrance, 49 Tex. Civ. App. 542, 109 S. W. 418.

(23) Miller v. Klein (Mo. App. 1913), 160 S. W. 562.

(24) Star Brewery Co. v. Primas, 163 Ill. 652, 45 N. E. 144.

(25) Bacon v. Sandberg, 179 Mass. 396, 60 N. E. 936.

(26) Union Trust & Realty Co. v. Best, 160 Cal. 262, 116 Pac. 737.

with the erection of the house in this manner after plaintiff had complained of the windows but made no objection to the eaves.[27]

The owner of property, in conveying a portion thereof, inserted restrictive covenants in the deed which were applicable to a residential neighborhood, and had relation to the protection of the dwelling house occupied by the grantor on his remaining property. Subsequently his grantees of such remaining portion pulled down the dwelling house and converted the property to business uses. Held, that the advantage of the restrictions could no longer be claimed in favor of such property.[28]

A restriction in a deed of conveyance of a lot against the sale of liquor thereon is waived by the subsequent conveyance by the same grantor of adjoining premises without restriction, and such adjoining premises have been and are used for the sale of liquor. It is not material in such a case that the omission of the restriction in the latter conveyance was a mistake.[29]

Complainant was the owner of a dominant estate in favor of which restrictions were imposed on the servient estate against the use of the latter for the sale of intoxicating liquors. A saloon was opened on the servient estate in May, and in May or June complainant drank beer in the saloon. It was shown that in May of the following year complainant refused to execute a written waiver or release of the restriction when requested to do so by the owner of the saloon. Held, that no waiver was shown.[30]

The defendant purchased one of the lots in a tract of land in which all were subject to a restriction that no building other than a residence with the customary outbuildings should be erected thereon, and that such residence should be erected not less than a specified distance from the front line of the premises, and erected thereon a dwelling which violated such restriction. It was held that complainant could not be said to have waived his right to maintain an action on account of such violation by reason of the fact that before defendant bought his lot buildings had been placed on various other lots in the tract in violation of the restriction without objection on the part of complainant or other lot owners, where there was nothing to show that complainant was damaged by such other violations, or had any knowledge thereof until after the commencement of the action.[31]

Where Complainant Was Not Materially Affected by Other Violations.—Where the owner of a lot in a territory uniformly restricted under a general scheme in which restrictions were imposed on each lot for the benefit of all others within the territory, was not materially affected by several violations of such restrictions, he is not thereby barred of enforcing observance of such restrictions against the owner of a lot whose violation would materially affect him in the use of his property.[32]

This is in accord with the principle that a complainant does not waive or lose his right to enforce restrictions where their violation becomes especially and personally offensive and injurious to him and his property by reason of his previous omission to take notice in cases not affecting him or his interests, or the locality in which his property is situated.[33]

The fact that complainant's neighbors have erected steps and ornamentations which project into the restricted portion of their lots, of which he has not complained, does not estop him from complaining of the erection of the front wall of a building several feet beyond the building line.[34]

(27) Meany v. Stork (N. J. Eq. 1912), 83 Atl. 492.

(28) Deeves v. Constable, 87 N. Y. App. Div. 352, 84 N. Y. Supp. 592.

(29) Jenks v. Pawlowski, 99 Mich. 110, 56 N. W. 1105, 22 L. R. A. 863, 39 Am. St. Rep. 522.

(30) Star Brewery Co. v. Primas, 163 Ill. 652, 45 N. E. 144, affirming 59 Ill. App. 581.

(31) Alderson v. Cutting, 163 Cal. 503, 126 Pac. 157.

(32) Barton v. Slifer (N. J. Eq. 1907), 66 Atl. 899.

(33) Schadt v. Brill (Mich. 1913), 139 N. W. 878.

(34) Tripp v. O'Brien, 57 Ill. App. 407.

Nor is a complainant estopped to complain of a breach of a restrictive covenant merely because he acquiesced in its violation in a prior instance, where the former breach was slight, and the latter flagrant and would greatly injure him. Especially is this true when the validity of the covenant at the time of the first violation was in doubt.[35]

Complainant cannot be said to have waived his rights under a restrictive covenant forbidding the erection of double houses, where he permits the erection of such a house without protest in a different block from that in which his own land is situated, and which is more than a quarter of a mile distant from his land and the respective blocks are separated by a street sixty feet wide.[36]

Consent to Modification of Covenant is Not a Waiver.—A restrictive covenant may, of course, between the parties interested therein, be modified to any extent and the parties will be bound by the covenant as modified without any question of waiver being raised.

A lease provided that the demised premises should be used "strictly as a private dwelling, and not for any public or objectionable purpose," and contained a renewal clause. In an action to compel specific performance of the renewal clause, it was held that the use of the premises as a boarding house constituted a defense to the action, as the use was in violation of the terms of the covenant, and the fact that the lessor had consented that the premises be used for sleeping rooms in connection with a girls school did not constitute a waiver of such covenant.[37]

In this respect the court said: "The consent of the lessor that the plaintiff might occupy and use the house himself, in connection with his school for young ladies, cannot fairly be construed as a general or absolute waiver of the limitations as to the nature of the occupation. It is not the case of a condition which, when once dispensed with, is discharged for all purposes, and cannot be revived, but of a covenant which can be modified by consent. The lessor might be willing to consider such a use of the house as not an entire departure from its intended character of a private dwelling, and not to an appropriation to a public or objectionable purpose. But its conversion into a public boarding house is an entirely different matter."

Acquiescence in Slight Violation Does Not Give Right to Violate in Greater Degree.—Although a complainant may lose the right to enjoin a defendant from violating restrictions imposed on the use of his land by acquiescence in such use for a number of years, he may still enforce observance of such restrictions to prevent an extension of the business constituting the violation, where such extension would constitute a violation in a much greater degree and render the business very objectionable.[38]

It has been held that acquiescence in the erection and operation of noxious works in violation of restrictive covenants, while they produce little injury, does not warrant a subsequent extension of them to an extent productive of great damage.[39]

Where the Restrictions are Imposed for the Benefit of the Grantor or His Property Exclusively.—When a grantor exacts restrictive covenants of a number of his grantees for his exclusive benefit, he is master of the situation in this respect, and may release one or more of such grantees from their covenants, or acquiesce in their violation of them, and enforce observance of similar covenants by the other grantees.

Likewise, where a restriction is imposed on a lot for the exclusive benefit of another lot, the fact that the owner of the

(35) Misch v. Lehman (Mich. 1913), 144 N. W. 556.
(36) Schadt v. Brill (Mich. 1913), 139 N. W. 878.
(37) Gannett v. Albree, 103 Mass. 372.
(38) Leaver v. Gorman, 73 N. J. Eq. 129, 67 Atl. 111.
(39) Bankart v. Houghton, 27 Beav. (Eng.) 425.

dominant lot acquiesced in the violation of similar restrictions imposed on other lots in the vicinity, does not deprive him of the right to enforce observance of the covenant in question so long as it is of any benefit to him.[40]

Acquiescence in Violation of One of Several Restrictions.—The right to enforce observance of one restrictive covenant in a deed is not necessarily affected by acquiescence in the violation of another and distinct covenant as to the use of the same land and contained in the same deed.

A complainant may acquiesce in the violation of a restriction requiring that no buildings except dwellings shall be erected on the land in question, and retain his right to enforce observance of a restriction requiring the buildings to be of not more than a specified depth.[41]

Where Complainant Has Violated the Restriction He Seeks to Enforce.—It is well settled law that one who violates a mutually restrictive covenant will not be heard in a court of equity to complain of a similar violation by his neighbor.[42]

If the case shows a wilful violation on the part of complainant of the covenant which he seeks to enforce, he is precluded from relief under the familiar rule that, he who seeks equity must do equity; or in other words, must come with clean hands and be free from iniquity in respect of the same subject-matter. This rule, however, is not applicable where, although complainant has not abided the covenant, he has not acted with a wilful purpose to disregard the rights of others. The doctrine of abandonment is less harsh than this rule, and may often defeat complainant's suit where the application of this rule would seem harsh and almost inequitable.[43]

(40) Lattimer v. Livermore, 72 N. Y. 174.

(41) Lattimer v. Livermore, 72 N. Y. 174.

(42) Smith v. Spencer (N. J. Eq. 1913), 87 Atl. 158; Alvord v. Fletcher, 28 N. Y. App. Div. 493, 51 N. Y. Supp. 117; Clum v. Brewer, 5 Fed. Cas. No. 2,910.

(43) Scharer v. Pantler, 127 Mo. App. 433, 105 S. W. 668.

In determining whether complainant is chargeable with such inequitable conduct as to disentitle him to enforce any rights whatever under a restrictive covenant, the whole situation and circumstances as to the nature, burden and object of the covenant, and the extent to which the violation by the complainant affects the covenant, must be considered as well as the circumstances of its violation, the denial of the remedy or relief is not a conclusion which follows necessarily upon the fact of complainant's violation, but depends upon the whole circumstances of the case as affecting his own equitable status.[44]

Although the complainant has acted in good faith, and unintentionally violated a restriction, he cannot enforce an adjoining owner to observe such restriction who has himself in good faith committed a similar violation.[45]

The court will sometimes grant relief to a plaintiff who has not kept his part of the contract, but this is when the breach is of such a nature that it may be fully repaired, and one of the conditions precedent to the granting of relief may be full reparation.[46]

Where Plaintiff's Violation Has Been Slight.—Although the complainant may have been guilty of some unsubstantial violation on his part of the restrictive covenant which he seeks to enforce, equity will restrain a substantial violation by the defendant.

Thus, where complainant sought to enforce a restriction providing that dwellings erected on the premises in question should be set back twenty-five feet from the street line, the fact that the steps of his house projected about four feet into the restricted space on his own lot, was not such a violation on his part as to preclude him from maintaining an action to enjoin the defend-

(44) Howland v. Andrus, 80 N. J. Eq. 276, 83 Atl. 982.

(45) Stollard v. Normile, 181 Mass. 412, 63 N. E. 941.

(46) Clum v. Brewer, 5 Fed. Cas. No. 2,910.

ant from a substantial violation of the covenant.[47]

The fact that complainant violated a restrictive covenant by the construction of an open piazza which extended into the restricted portion of his lot, but did not obstruct the view from adjacent property, was held not to bar him of a right to enforce observance of such restriction by an adjacent owner, as his violation was immaterial.[48]

Violation by Only Some of Complainants.—Where several complainants join in the same suit to restrain the violation of a restrictive covenant, the fact that one of them has been guilty of a violation of the same covenant which they seek to enforce observance of, will not prevent the granting of injunctive relief in the action.[49]

Laches.—Relief in equity in which the enforcement of a restrictive covenant is sought is granted only when sought with promptness, and where active diligence has been exercised throughout respecting matter of complaint. Conscience requires that one should not stand by in silence while another makes considerable expenditures in good faith under an assumed right, and then ask a court to enforce compliance with the covenant at great loss, when reasonable notice or other appropriate action might have prevented the wrong complained of.[50]

Every relaxation of the terms of the covenant permitted amount, *pro tanto*, to a disaffirmance of their obligations.[51]

There is no hard and fast rule as to what constitutes laches. If there has been unreasonable delay in asserting claims, or if, knowing his rights, a party does not seasonably avail himself of means at hand for their enforcement, but suffers his adversary to incur expense or enter into obligations, or otherwise change his position, or in any way by inaction lulls suspicion of his demands, to the harm of the other, or if there has been actual or passive acquiescence in the performance of the act complained of, then equity will ordinarily refuse her aid to the establishment of an admitted right.

So long, however, as there is no knowledge of the wrong committed and no refusal to embrace opportunity to ascertain facts there can be no laches. Upon the discovery of infringement of rights, such reasonable expedition is required in their prompt assertion as is consistent with due deliberation as to the proper means of relief.

On the other hand, one who openly defies known rights, in the absence of anything to mislead him or to indicate consent or abandonment on the part of others, is not in a position to urge as a bar failure to take the most instant conceivable resort to the courts. After the right has been invaded under circumstances which would not defeat a plaintiff in seeking relief, and no substantial harm is shown to have accrued to the wrongdoer from delay, there is not the same imminent necessity for the early enforcement of demands as exist before conditions have become fixed. Mere lapse of time, although an important, is not necessarily a decisive consideration. Within the somewhat flexible limitations of these general rules, what may be laches in any case depends upon its peculiar facts.[52]

The owner of land commenced the erection of a building in violation of restrictions imposed on the use thereof, and was notified by the owner of the dominant estate to discontinue such violation, which he did. Several months thereafter he resumed the construction of the building, and on the same day that he commenced work he was again warned by the owner of the dominant estate, but continued and rushed the work to completion in two days. Held, that he could not claim that the owner of

(47) Adams v. Howell, 58 N. Y. Misc. 435, 108 N. Y. Supp. 945.

(48) Newbery v. Barkalow (N. J. Eq. 1909), 71 Atl. 752.

(49) Compton Hill Impt. Co. v. Strauch, 162 Mo. App. 76, 141 S. W. 1159.

(50) Loud v. Pendergast, 206 Mass. 122, 92 N. E. 40.

(51) Russell v. Harpel, 20 Ohio Cir. Ct. Rep. 127.

(52) Stewart v. Finkelstone, 206 Mass. 28, 92 N. E. 37.

the dominant estate had been guilty of laches.[53]

Where the construction of a building by defendant in violation of a restriction was concealed from public view by a high board fence, which enclosed the premises along the street, and complainant filed his bill as soon as he discovered that the building was in violation of the restriction, he was not guilty of laches.[54]

Change in the Character of the Restricted Neighborhood.—Courts of equity have uniformly refused to interfere for the purpose of enforcing observance of a restrictive covenant where the evidence shows that a state of things has arisen in the march of events which the parties to the agreement did not contemplate when it was made, and which would render its enforcement inequitable and unjust, resulting in injury to the defendant without any permanent benefit to the complainant.[55]

If covenants restricted the grantees of lots to use of them for residence purposes, and since their execution the whole neighborhood has ceased to be used for such purposes and has been wholly given up to business, manufacturing and the like, equity will likely refuse to enforce observance thereof.[56]

This principle has never been applied, however, where a certain part of property has been devoted to a use which can be shared by adjoining property belonging to the grantor, and which had been for many years improved and occupied in accordance with the mutual covenants to which all the adjoining property was subject. Under such a reservation or covenant there has been acquired a property right which is appurtenant to the dominant owner's estate and to which the servient owner's property is subject, and which cannot be destroyed without compensation.[57]

Where the change in the neighborhood does not tend to defeat the essential purpose of the restrictions, the benefit therefrom is considered to remain unimpaired, and a violation will be enjoined.[58]

It has been held that if a restriction is still of substantial value to a dominant estate, equity will restrain its violation if relief is promptly sought, notwithstanding the changed use of the land and buildings in the vicinity.[59]

The fact that the character of the territory surrounding the restricted district has changed does not affect the question of the enforcement of the restriction within such district.[60]

To defeat the enforcement of a restriction against the sale of intoxicating liquor on premises, on the ground of a change in the character of the neighborhood, there must be such a change caused by the grantor or those claiming under him, as to defeat the purpose of the restriction or to seriously injure the property rights of the grantee if enforced.[61]

A building line restriction may sometimes be enforced after the street has changed from a residence to a business one. Such a covenant may be as advantageous where the property fronting on the street is used for business purposes as when it was used for residences.[62]

The mere fact that lots subject to restrictions forbidding their use for other than dwelling purposes become more valuable

(53) Hansel v. Downing, 17 Pa. Super. Ct. 235.

(54) Codman v. Bradley, 201 Mass. 361, 87 N. E. 591.

(55) Boston Baptist Social Union v. Boston University, 183 Mass. 202, 66 N. E. 174; Jackson v. Stevenson, 156 Mass. 496, 31 N. E. 691, 32 Am. St. Rep. 476.

(56) Moore v. Curry (Mich. 1913), 142 N. W. 839.

(57) Batchelor v. Hinkle, 132 N. Y. App. Div. 620, 117 N. Y. Supp. 542.

(58) Sanford v. Keer (N. J. Eq. 1912), 83 Atl. 225.

(59) Landell v. Hamilton, 175 Pa. St. 327, 34 Atl. 663, 34 L. R. A. 227.

(60) Thompson v. Langan (Mo. App. 1913), 154 S. W. 808.

(61) Star Brewery Co. v. Primas, 163 Ill. 652, 45 N. E. 144.

(62) Zipp v. Barker, 6 N. Y. App. Div. 609, 40 N. Y. Supp. 325.

for business purposes, is not enough to justify a court in nullifying such covenants.[63]

Where, by reason of changed conditions, it would be inequitable to enforce the observance of restrictive covenants, a court of equity may sometimes deny such relief and at the same time, in lieu thereof, award damages for such breach.[64]

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(63) Miller v. Klein (Mo. App. 1913), 160 S. W. 562; Spahr v. Cape, 143 Mo. App. 114, 122 S. W. 379.

(64) Amerman v. Deane, 132 N. Y. 355, 30 N. E. 741.

LANDLORD AND TENANT.—INTEREST IN LAND.

NEWTON v. LONG. (No. 16378.)

Supreme Court of Mississippi. June 15, 1914.

65 So. 460.

A license or a lease to go upon land and extract resin or turpentine from standing trees is not an interest in the land as such, and, being mere personal property, need not be conveyed in writing.

REED, J. Appellee obtained a decree against appellant for $87.87, the value of turpentine taken by appellant from trees included in a lease held by appellee.

Appellant contends that appellee had no right to recover, because the lease in question was not owned by him; it having been included in a sale of leases by a former owner to the Standard Naval Stores Company, a corporation, evidenced by an instrument of writing duly executed and recorded, and it never having been conveyed in writing by that company. It is in testimony that the former owner, Levi Anderson, did not intend to convey the lease to the Standard Naval Stores Company; that it was never paid for nor claimed, nor worked by the company; and that it was included in the deed by a mistake.

[1] It has been held in the case of Hancock County v. Imperial Naval Stores Co., 93 Miss. 822, 47 South 177, 17 L. R. A. (N. S.) 693, 136 Am. St. Rep. 136, that a license or lease to go upon land and extract resin or turpentine from standing trees is not any interest in the land as land, and that the instrument granting the right does not pass such interest. In Jones v. Adams, 61 South. 420, it was held that a turpentine lease is personal property.

As the lease in this case is personal property, it was not necessary for it to have been reconveyed to Mr. Anderson by the Naval Stores Company in writing. In the instrument of writing purporting to transfer the lease in question the value of the lease is shown to be less than $50 in amount; for the lease and two other leases are together listed at a total valuation of $50.

[2] The refusal and failure by the Standard Naval Stores Company to pay for, claim, work, or in any way use the lease, or assert any right thereto, manifested its purpose not to recognize any ownership through the conveyance, nor any title which might be vested thereby, and further shows its purpose to release and return to Mr. Anderson any interest which may have passed to the company by the conveyance. The decision by the chancellor that the inclusion of lease in the written transfer by Mr. Anderson to the Standard Naval Stores Company was a mistake, and that no title thereto passed, is sustained by evidence.

There is sufficient evidence to warrant the chancellor's holding that appellant had no right to "cup" or "back-box" the trees by reason of the lease made to him subsequent to the original lease which passed to appellee.

Affirmed.

NOTE.—*License to Go on Land and Remove Products as Personal Property.*—The question involved in the instant case is most often found treated as regards taxation, but the principle upon which the cases proceed is applicable outside of this question, as the instant case shows. Generally it is to be said that a license creates no title in land but operates merely an exemption from liability for acts done upon land, which otherwise might amount to trespass. Therefore the question here is whether where the license gives the right to remove somthing from the land that would otherwise pass in conveyance of the land, this is an interest in the land, or mere personal property. Thus it has been held that turpentine in the boxes of trees which had been assigned to defendant was the subject of replevin. Richbourg v. Rose, 53 Fla. 173, 44 So. 69, 125 Am. St. Rep. 1061. The court said: "It is well settled that turpentine in boxes, in a state to be dipped up, is personal property. It no longer forms a part of the tree, but has been separated by a process of labor and cultivation. The turpentine crop has been properly classed with *fructus industriales*, for it is not the spontaneous product of the trees, but requires annual labor and cultivation." It was compared to the sap in the sugar maple. See State v. Moore, 11 Fed. 70.

So also it has been said that crude turpentine formed on the body of the tree is called scrape, which also is personal property. Lewis v. McNatt, 65 N. C. 63. The action in the case lay,

however, because it was property conveyed along with a right to gather it from the tree.

In Dickens v. State, 142 Ala. 49, 39 So. 14, 110 Am. St. 17, such turpentine has been held to be the subject of larceny. Of course, if this is true a license to remove same conveys no interest in land.

In Millikin v. Carmichael, 139 Ala. 226, 35 So. 706, 101 Am. St. Rep. 29, a turpentine lease in land that was a homestead was held valid though it was given by a husband without joinder by the wife. The effect of this was to declare the husband competent to allow a mere user of the land for a certain purpose, it being necessary to convey any interest therein that the wife should join, the land being a homestead.

Hancock County v. Imperial Naval Stores Co., 93 Miss. 822, 47 So. 177, 17 L. R. A. (N. S.) 693, 136 Am. St. Rep. 561, is considered from the standpoint of taxing the interest conveyed by a lease of a turpentine privilege, it being necessary for it to be taxed as a lease, that thereby an interest in land should be conveyed. It referred to the Millikin case, *supra*, and to Ashe Carson Co. v. State, 138 Ala. 108, 35 So. 38. This last case is to the effect that a license to go on land and sever and remove the products is not such an interest in land as is taxable as real property.

In Bryant v. United States, 105 Fed. 941, 45 C. C. A. 145, reference is made to the cutting and boxing of pine trees as in no way impairing the latter as timber, and the privilege to do this, therefore, is a mere license to appropriate turpentine as personal property.

In Clove Spring Iron Works v. Cane, 56 Vt. 603, a privilege even to cut timber and remove it was held not separately taxable as real estate. So it was held as to license to quarry and manufacture slate. Hughes v. Vail, 57 Vt. 41.

This seems different, however, as to mineral rights, a grant to which is distinguished from a mere license to enter and mine for coal. If the ore is actually separated from the soil it is taxable as personalty. Forbes v. Gracey, 94 U. S. 762. A freehold interest in minerals in place is taxable as realty, but a lease for years of mineral rights is not separately taxable. State v. South Penn. Oil Co., 42 W. Va. 80.

But then minerals are not of the same nature as timber or the fruit or crop of timber and the sharp distinction as to whether the timber or the product thereof is in place or not does not obtain in questions of this kind. Certainly nothing of a permanent sort is taken from the land in taking therefrom what the trees produce, and the trees themselves are not of the same nature as minerals. C.

ITEMS OF PROFESSIONAL INTEREST.

THE MEETING OF THE MISSOURI BAR ASSOCIATION.

The Missouri Bar Association met September 22d, at St. Louis in annual session, the address of welcome was delivered by Hon. Chas. P. Williams, president of the St. Louis Bar Association.

The president's annual address was delivered by Hon. Edw. J. White, of Kansas City. Other interesting addresses were as follows:

Hon. Percy Werner, of St. Louis, spoke on the subject of "Voluntary Tribunals." The subject of "Workman's Compensation" was handled by Hon. Alroy S. Phillips, of St. Louis. Hon. Rome G. Brown, of Minneapolis, delivered a practical address entitled "The Dilemma of the Advocate of Judicial Recall." A splendid address on the subject of "The Evolution of the Independence of the Judiciary" was delivered by Hon. Hampton L. Carson, of Philadelphia. Hon. H. C. McDougal, of Kansas City, spoke on "The Bench and Bar of the Platte Purchase," while Hon. Henry Lamm, Chief Justice of the Supreme Court of Missouri, spoke on "The Law's Delays."

Many interesting propositions for reform in procedure and plans for instituting a propaganda for a new amendment to the constitution, giving the Supreme Court great power to fix the rules for pleading and practice, were discussed.

HUMOR OF THE LAW.

It was during the course of a trial in Philadelphia that the cross examining attorney put the following question to a witness:

"Was it the defendant's habit to talk to himself when alone?"

The witness pondered for a moment over this, and then cautiously replied:

"Just at this time, I don't remember ever being with him when he was alone."

The most ingenious means of defrauding a penny-in-the-slot gas-meter has been discovered, according to the "Journal," in Honolulu.

The gas company in Honolulu recently found that one of their customers was undoubtedly consuming large quantities of gas, although no coins were ever found in his meter. Baffled in their attempts to discover the fraud, the company at last offered to pay the man for his secret, at the same time guaranteeing him against prosecution.

He then showed them a mould of the exact size of the copper coin used for the meter and an ice machine. He explained that with these he made a disc of ice, which he put into the meter to release a supply of gas. The disc then melted, and the water dried up, so that when the meter came to be opened there was nothing inside.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Assumpsit, Action of**—Common Counts.—Fees for services rendered by an attorney may be recovered upon the common counts in assumpsit.—Newman v. Levi, W. Va., 81 S. E. 1036.

2. **Bankruptcy** — Preference.—A bankrupt's trustee, to recover an alleged preference, must prove that the bankrupt, while insolvent, and within four months prior to bankruptcy, made the transfer, and that the creditor receiving it would thereby obtain a greater percentage than other creditors of the same class.—Soule v. First Nat. Bank of Ashton, Idaho, 140 Pac. 1098.

3. **Banks and Banking**—Deposit.—A general deposit in a bank is not a bailment, but a giving of credit only, and after the making of such deposit the bank is a debtor and not a bailee.—Shuman v. Citizens' State Bank of Rugby, N. D., 147 N. W. 388.

4. **Bills and Notes**—Equitable Assignee.—Neither an equitable assignee of notes, nor those claiming under him, could claim as innocent purchasers, where the assignee never had possession of the notes.—Green v. Eddins, Tex., 167 S. W. 196.

5.——Renewal.—A note given in renewal of a previous note without consideration was also without consideration.—Seager v. Drayton, Mass., 105 N. E. 461.

6. **Brokers**—Principal and Agent.—A contract that a broker should receive a named per cent. for selling land and have a definite interest in the remaining lots after a sufficient number to satisfy a mortgage were sold, he to pay all sale expenses and one-half of the mortgage indebtedness, held to create merely the relationship of principal and agent which could be terminated at will of the principal.—McKellop v. Dewitz, Okla., 140 Pac. 1161.

7. **Cancellation of Instruments**—Reconveyance.—Though the title to real estate conveyed by husband and wife to a son in consideration of his supporting and caring for them for life was in the husband, the wife has such an interest in the agreement for support that she may sue alone, in case her husband refuses to become plaintiff, for reconveyance of the property and a rescission of the agreement, joining the husband as a party defendant.—Young v. Young, Wis., 147 N. W. 361.

8. **Carriers of Goods**—Presumption.—Where goods shipped over several connecting lines are found to be injured at destination, there is no presumption that the injury occurred on the line of the first carrier.—Chicago, R. I. & P. Ry. Co. v. Diggs, Okla., 140 Pac. 1160.

9. **Carriers of Live Stock**—Burden of Proof.—Where a carrier defends an asserted liability for injuries to live stock in transit on the ground that the stock when received were unfit for shipment, and that the injuries were caused by such fact, the burden was on it to establish such defense by a preponderance of the evidence.—Ralston v. Union Pac. R. R. Co., Neb., 147 N. W. 478.

10. **Carriers of Passengers**—Alighting.—A trolley car passenger, who may alight with safety on the station side, but who alights on the opposite side, where there is a drop from the car step to the ground of about 30 inches, is a matter of law guilty of contributory negligence.—Rosenthal v. Troy & N. E. Ry. Co., 147 N. Y. Supp. 725.

11.——Proximate Cause.—Where a brakeman negligently directs a passenger to alight at a station other than her proper destination, the carrier is liable for all damages proximately resulting from such negligence.—Chicago & E. I. R. Co. v. Mitchell, Ind., 105 N. E. 396.

12.——State Lines.—A passenger who traveled from one point to another in the same state, over a route through another state for a short distance, is not entitled to recover the penalty imposed upon a railroad for charging a greater compensation than was permitted by the state statutes.—St. Louis, I. M. & S. R. Co. v. Spriggs, Ark., 167 S. W. 96.

13.——Transfer.—A street railroad, directing a passenger to transfer from a car to another immediately following on the same track, was bound to exercise the highest degree of care in enabling him to transfer safely, and on stopping away from the regular stopping place was bound to warn him of danger of stepping from the car into a depression in the ground.—Wakeley v. Boston Elevated Ry., Mass., 105 N. E. 436.

14. **Commerce**—Employe.—If a railroad employe was killed while engaged in interstate commerce, an action for his wrongful death must be brought under the act of Congress relating to the liability of common carriers for injuries to their employes, etc., instead of under the state statutes.—Armbruster v. Chicago, R. I. & P. Ry. Co., Iowa, 147 N. W. 337.

15.——Initial Carrier.—The Carmack Amendment to the Hepburn Act, making initial carriers liable for loss caused by them or any connecting carrier, does not apply to transportation from a point in one state through another state to an adjoining foreign country.—Burke v. Gulf, C. & S. F. Ry. Co., 147 N. Y. Supp. 794.

16. **Contracts**—Building Contract.—Where a contractor quit work and the owner completed

the building as permitted in such case by the contract, the owner is liable to the contractor only for the contract price, less the sum required for completion.—Borup v. Von Kokeritz, 147 N. Y. Supp. 832.

17.——Mistake.—Mistake of the parties as to a material fact entering into the agreement will in some exceptional cases enable the injured party to rescind; but the doctrine is not of general application.—Williams v. Butler, Ind., 105 N. E. 387.

18.——Mistake of Law.—A "mutual mistake of law" is a misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake.—Northwest Thresher Co. v. McNinch, Okla., 140 Pac. 1170.

19.——Pleading.—That the complaint in a surgeon's action for services in treating defendant's minor son alleged an express promise to pay held not to preclude recovery on an implied promise.—Lufkin v. Harvey, Minn., 147 N. W. 444.

20.——Public Policy.—Contracts to perform acts forbidden by express criminal statutes are ordinarily unenforceable.—Wald v. Wheelon, N. D., 147 N. W. 402.

21.——Rescission.—While defendants could not rescind a contract while plaintiff was faithfully performing his part of it, defendants could refuse to go any further with the contract and pay such damages as plaintiff might sustain therefrom.—Fulton v. Canno, 147 N. Y. Supp. 721.

22.——Set-off.—Where the owner of a building accepts an elevator which has not been completed in compliance with the contract, this does not preclude him from claiming damages by way of set-off, in an action for the contract price, for deficiencies in the work.—Otis Elevator Co. v. Flanders Realty Co., Pa., 90 Atl. 624.

23.——Third Person.—Plaintiffs' sale of stock in a furniture company held sufficient consideration to support an agreement to pay a sum of money upon contingency to a school, though defendant was not personally benefited; it appearing that plaintiffs refused to make the sale under any other conditions.—Trustees of Leaksville Spray Institute v. Mebane, N. C., 81 S. E. 1020.

24. **Corporations**—Foreign Corporation. — A foreign corporation engaged in interstate commerce with a resident of the state is not subject to Act March 22, 1909, prohibiting the transaction of business within the state by foreign corporations which have not complied with such act.—Fruit Dispatch Co. v. Wood, Okla., 140 Pac. 1138.

25.——Subscription.—A stock subscription accepted by the corporation cannot be canceled or withdrawn, except for fraud or mistake, or withdrawn without consent of the corporation and all stockholders.—King v. Howeth & Co., Okla., 140 Pac. 1182.

26. **Covenants**—Apartment House.—Erection of an apartment house four stories high adapted only for dwelling purposes held not violative of a covenant that only churches or dwelling houses shall be erected, and that the buildings erected shall be used only as dwelling houses. —Johnson v. Jones, Pa., 90 Atl. 649.

27. **Criminal Law**—Accomplice.—A witness is not an accomplice merely because he received from accused a specified sum to procure prosecutrix to write a letter asking for the dismissal of a prosecution for rape, or merely because he obtained a part of the amount so paid.—Burge v. State, Tex., 167 S. W. 63.

28.——Collusion.—At common law a collusive trial before a justice of the peace instituted on statement of accused resulting in acquittal is not a bar to a prosecution by indictment.—State v. Ketchum, Ark., 167 S. W. 73.

29.——Corpus Delicti.—Other crimes than the one for which a defendant is upon trial are not admissible to prove the corpus delicti, but only where the act constituting the crime under investigation has been clearly established, and the motive intent, or guilty knowledge is in issue.—Kahn v. State, Ind., 105 N. E. 385.

30.——Dying Declaration.—An instruction that a dying declaration is entitled to no more weight than if the deceased was present and testifying, held erroneous as calculated to lead the jury to believe that such declarations are entitled to the same weight as the testimony of living witnesses.—State v. Valencia, N. M., 140 Pac. 1119.

31.——False Pretenses.—On a trial for obtaining money by false pretenses by a worthless check, evidence of the giving of other worthless checks by accused about the time of the giving of the check involved was admissible to show intent.—State v. Foxton, Iowa, 147 N. W. 347.

32.——Former Jeopardy.—Where defendant had pleaded not guilty to all nine counts of an indictment, but only one count was submitted to the jury, it constituted former jeopardy as to those counts if the defendant did not consent to their being withdrawn from the jury.—Hewitt v. State, Tex., 167 S. W. 40.

33.——General Verdict.—Where it appears that only one criminal transaction is involved, and the joinder of different counts is only to meet the various aspects which may be presented by the evidence, the court will permit a general verdict.—State v. Bickford, N. D., 147 N. W. 407.

34. **Deeds**—Duress.—Circumstances of extreme necessity, though not accompanied by any duress may be sufficient to set aside a deed from husband to wife.—Faulkner v. Faulkner, 147 N. Y. Supp. 745.

35. **Election of Remedies**—Former Recovery. —The bringing of an unsuccessful suit for deceit in connection with an exchange of automobiles did not bar a recovery of damages for breach of the contract.—Pierce v. Mitchell, Vt., 90 Atl. 577.

36. **Electricity**—Negligence.—The placing and maintaining of electric light wires so close to telephone wires that they come in injurious contact presumably constitutes negligence on the part of the owner of the former.—Weleetka Light & Water Co. v. Northrop, Okla., 140 Pac. 1140.

37. **Embezzlement**—Indictment.—That an indictment for embezzlement, instead of alleging that title to money contracted to be deposited by a vendee to the credit of one of two tenants in common is jointly in both tenants in common, alleges that the title is in the one will not render it erroneous.—State v. Probert, N. M., 140 Pac. 1108.

38. **Equity**—Laches.—Suits in equity brought after expiration of the limitation period are looked on with suspicion, and, unless defendant is responsible for complainant's want of knowledge, can rarely be maintained.—Taylor v. Coggins, Pa., 90 Atl. 633.

39. **Evidence**—Fraudulent Misrepresentations —In an action for fraudulent misrepresentations testimony of a witness for the plaintiff that defendant had induced him to leave the state in order to prevent his testifying was admissible. —Loftus v. Sturgis, Tex., 167 S. W. 14.

40.——Statute of Frauds.—The rule that parol evidence of prior negotiations is admissible where a contract is within the statute of frauds, and the writing is merely confirmatory thereof, does not apply where the writing constitutes the contract itself.—Sims v. Farson, 147 N. Y. Supp. 769.

41. **Executors and Administrators**—Fraudulent Conveyance.—A conveyance, made in fraud of creditors shortly before the grantor's death, vests title in the grantee subject to being charged, in administration proceedings, with any debts owing by the grantor's estate.—Johnson v. Rutherford, N. D., 147 N. W. 390.

42. **False Pretenses**—Checks.—Under the statute, one who gives a check on a bank in which he has no funds, and without reasonable expectation that the check will be paid on presentation, and who delivers it to a third person and secures money thereon, is guilty of obtaining property by false pretenses.— State v. Foxton, Iowa, 147 N. W. 347.

43. **Fraud**—Deceit.—The rules and principles governing actions for deceit in the sale of real or personal property apply to actions for procuring personal service by fraud.—Hunt v. Lewis, Vt., 90 Atl. 578.

44.——Rescission.—One induced by fraud to enter into a contract whereby he has suffered damage is not required to rescind the contract, but, without rescission, may recover damages suffered by reason thereof.—Meyerson v. Gershel, 147 N. Y. Supp. 882.

45. **Frauds, Statute of**—Parol Agreement.—A parol agreement by the seller of his business not to engage in similar business in the village, so long as the buyer engages therein in the village, is not within the statute of frauds.—Tomlin v. Clay, Tex., 167 S. W. 204.

47. **Homestead**—Abandonment.—Where land has once been impressed with a homestead character, no act or omission of the husband without the consent of the wife can result in abandonment.—Alton Mercantile Co., v. Spindel, Okla., 140 Pac. 1168.

48. **Homicide**—Dying Declaration.—Where decedent's attending physician testified that he told decedent he could not live, and decedent expressed his concurrence in that opinion, the dying declaration of decedent was admissible.—McDaniels v. State, Ark., 167 S. W. 96.

49.——Reduction of Degree.—Where a defendant charged with first degree murder relies on the defense of intoxication to reduce the offense to murder in the second degree, he need only raise a reasonable doubt relative thereto in the jurors' minds.—State v. Cooley, N. M., 140 Pac. 1111.

50. **Husband and Wife**—Estoppel.—Where a married woman, authorized by her husband, made an absolute sale of her separate realty, and her vendee conveyed it to a corporation, in which the woman was the largest stockholder, and the corporation mortgaged the premises, she could not assail the mortgage for marital coercion, error, or fraud in the original sale.—Parent v. First Nat. Bank of Gulfport, Miss., La., 65 So. 233.

51.——Necessaries.—A husband is not liable for necessaries furnished by third persons to his wife, living apart from him; she having obtained an enforceable order of the probate court, complied with by him, for his making to her certain payments at stated times for her support.—Malden Hospital v. Murdock, Mass., 105 N. E. 457.

52.——Separate Property.—Where a husband and wife treated animals as her separate property under a mistaken view of the law, there was no gift to the wife, but if the husband relinquished his claim because it was just to the wife, there was a gift by him to her of such animals.—Wofford v. Lane, Tex., 167 S. W. 180.

53.——Voluntary Conveyance.—A conveyance by a husband to a wife of their home property on her demand and in consideration of her agreement to continue to live with him as a wife held not a voluntary conveyance, but in the nature of a trust, so that on her refusal to perform he was entitled to a reconveyance.—Faulkner v. Faulkner, 147 N. Y. Supp. 745.

54. **Insurance**—Application.—Both at common law and under Revisal 1905, § 4808, any representation in an application for life insurance is material, if the knowledge or ignorance of it would reasonably influence the judgment of the insurer in making the contract, or in fixing the rate of premium.—Schas v. Equitable Life Assur. Society, N. C., 81 S. E. 1014.

55.——Indemnity.—An insurer, issuing an indemnity policy and stipulating that it would defend actions against insured, who should not interfere therewith, held liable for the amount of a judgment against insured, paid pending an appeal by insurer without executing a stay bond.—E. M. Upton Cold Storage Co. v. Pacific Coast Casualty Co., 147 N. Y. Supp. 765.

56.——Indemnity.—That an indemnity insurance company refused to agree to a settlement which insured could have procured, and a judgment for a greater amount was obtained against insured, held not to render the insurer liable for that part of the judgment above the amount of the insurer's liability as fixed by the policy and in excess of the settlement which it refused to accept.—C. Schmidt & Sons Brewing Co., v. Travelers' Ins. Co., Pa., 90 Atl. 653.

57.——Liability Policy.—Assured, under an employer's liability policy, not having paid a judgment recovered against it by an employe, held not entitled to recover on the policy.—Atlas Hardwood Lumber Co. v. Georgia Life Ins. Co., Tenn., 167 S. W. 109.

58.——Wager Policy.—A policy made without interest is a wager policy, having nothing in common with insurance but the name and form.—Moving Picture Co. of America v. Scottish Union & National Ins. Co. of Edinburgh, Pa., 90 Atl. 642.

59. **Judgment** — Counterclaim.—A judgment does not bar an independent action on a claim set forth as a counterclaim not necessarily in conflict with the cause of action sued on and not passed on by the court, but bars a subsequent action on a claim inconsistent with the cause of action sued on.—Weinman v. Salit, 147 N. Y. Supp. 758.

60. **Landlord and Tenant**—Guest of Tenant.—One injured while visiting a tenant for purposes of his own could not recover from the landlord for injuries caused by defects in the part of the premises retained by him.—Alessi v. Fitzgerald, Mass., 105 N. E. 437.

61.——Invitee.—The landlord's duty to keep that part of the premises remaining in his control in reasonably safe condition grows out of the contract with the tenant, but a lawful visitor independent of contract may recover, though the tenant could not because of knowledge of and consent to the condition.—Loucks v. Dolan, N. Y., 105 N. E. 411.

62. **Libel and Slander**—Acts Constituting.—A slanderous statement cannot be excused because the several sentences taken alone contained no defamatory charge, for the language must be taken in its entirety.—Culver v. Marx, Wis., 147 N. W. 358.

63. **Master and Servant**—Assumption of Risk.—Assumption of Risk is a matter of defense which must be pleaded by defendant.—Lloyd v. Southern Ry. Co., N. C., 81 S. E. 1003.

64.——Conjecture.—Where a brakeman was injured by falling between the cars of a freight train while it was switching, and it was merely conjectural from the evidence whether the fall was caused by his own fault or the fault of the company, there can be no recovery.—Chesapeake & O. Ry. Co. v. Walker's Adm'r, Ky., 167 S. W. 128.

65.——Discharge.—Any inexcusable substantial violation by an employe of instructions, or substantial neglect of duty or misconduct which might seriously affect the employer's business, is good ground for discharging an employe regardless of any express agreement on the subject.—Thomas v. Beaver Dam Mfg. Co., Wis., 147 N. W. 364.

66.——Independent Contractor.—The test of whether one is an independent contractor or merely a servant or agent of the general contractors is not whether they actually exercised control over the manner in which, or the means by which, the work was to be done, but whether they had the right to do so.—Corrigan, Lee & Halpin v. Heubler, Tex., 167 S. W. 159.

67.——Res Ipsa Loquitur.—The doctrine of res ipsa loquitur applies, the other essential conditions to its proper application obtaining, to injury to an employe from the use of an appliance which it is the master's nondelegable duty to furnish and keep in a reasonably safe condition.—Wiles v. Great Northern Ry. Co., Minn., 147 N. W. 427.

68.——Scope of Employment.—The act of an employe operating a moulding machine in removing a splinter so as to start the machine, held not such a departure from the scope of the employment as to prevent a recovery for injuries received, where the accident was due to the youth and inexperience of the employe and lack of proper instructions.—Ensley v. Sylva Lumber & Mfg. Co., N. C., 81 S. E. 1010.

69.——Specific Performance.—While death, sickness and insanity, the act of God, do not affect most contracts, engagements to render personal services which cannot be performed by another are ended by the death, serious sick-

ness, or insanity of the party bound to perform them, and neither an action for specific performance or breach of contract will lie.—Williams v. Butler, Ind., 105 N. E. 387.

70. **Navigable Waters**—Riparian Rights.—A conveyance of an easement of a right of way for a highway along the shore of the ocean leaves in the grantor his riparian estate, as regards right to accretion.—Forgeus v. Santa Cruz County, Cal., 140 Pac. 1092.

71. **Negligence**—Assumption of Risk.—Where a contractor, repairing a stairway, invited the employes of another contractor, working on the same building, to use the stairway, the invitation was for its use in its then condition, with whatever work was being done thereon, and the employes so using it assumed the risk from its condition.—Cole v. L. D. Willcutt & Sons Co., Mass., 105 N. E. 461.

72. **Parent and Child**—Employment of Child.—Where a father consented to the employment of his minor child for one kind of work, the employer changing the work without the consent of the father to a more dangerous work, was responsible to the father for loss of the services of the child and expenses incurred following from the changed employment.—Southwestern Telegraph & Telephone Co. v. Coffey, Tex., 167 S. W. 8.

73. **Principal and Agent**—Power Coupled with Interest.—The phrase "a power coupled with an interest" means a writing creating in, conveying to, or vesting in an agent an interest or estate in the subject of the agency, as distinguished from the proceeds of the exercise of the agency.—McKellop v. Dewitz, Okla., 140 Pac. 1161.

74.——Proof of Agency.—While declarations of an agent are inadmissible to prove his agency, the agent is competent to testify to the fact of his agency, where the fact is material in a controversy between the alleged principal and a third person.—Tiernan v. Havens, 147 N. Y. Supp. 786.

75. **Railroads**—Abutting Owner.—An abutting owner cannot recover for damages to his property from the elevation of railroad tracks, though such elevation deprive him of the use of a siding constructed on his own land and connected with defendant's tracks at the old grade.—Ridgway v. Philadelphia & R. Ry. Co., Pa., 90 Atl. 652.

76. **Rape**—Outcry.—The failure of prosecutrix to make outcry or call for aid, when it may readily be obtained, or within reasonable time to disclose the offense after an opportunity to do so, tends to discredit her testimony.—Burge v. State, Tex., 167 S. W. 63.

77. **Reformation of Instruments**—Mutual Mistake.—Mutual mistake of the parties as to some material fact entering into the agreement is generally ground for reforming a contract, to the end that it may be enforced in accordance with the mutual agreement of the parties which the writing does not express.—Williams v. Butler, Ind., 105 N. E. 387.

78. **Release** — Pleading.—Where defendant pleaded a general release, the plaintiff may, in reply, allege mutual mistake of fact and fraud to avoid such release, although the action is one at law and the grounds for avoiding the release are equitable.—Warner v. Star Co., 147 N. Y. Supp. 803.

79. **Sales**—Damages.—In an action for breach of warranty on sale of personalty, the purchase price is prima facie the value of property as warranted, in the absence of other evidence.—Burgess v. Felix, Okla., 140 Pac. 1180.

80.——Express Warranty.—The test whether an affirmation is an express warranty is whether the seller assumed to assert a fact of which the buyer is ignorant, or merely stated an opinion on a matter of which the seller had no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment.—Coleman v. Simpson, Hendee & Co., 147 N. Y. Supp. 865.

81.——Fraud.—Where plaintiff was induced to purchase a traction engine by defendant's fraud, and there was breach of the contract by defendant, plaintiff could either sue for damages for breach or seek a cancellation of the contract and a return of the money paid.—Piersall v. Huber Mfg. Co., Ky., 167 S. W. 144.

82.——Implied Warranty.—There is no implied warranty that an article sold will answer a particular purpose not contemplated by the seller.—Buffalo Collieries Co. v. Indian Run Coal Co., W. Va., 81 S. E. 1055.

83.——Retention of Title.—A seller having reserved title under a conditional sale contract held not to have waived the right to retake the property by subsequently taking security, personal or collateral.—McDonald Automobile Co. v. Bicknell, Tenn., 167 S. W. 108.

84. **Trusts**—Statute of Frauds.—A parol agreement, at the time of executing a deed, that the grantee shall hold the title in trust for the grantor, and on sale pay the proceeds to him, the grantor retaining possession and collecting the rents is not within the statute of frauds.—Doll v. Doll, Neb., 147 N. W. 471.

85. **Usury—Evasion**—If usury be established then no matter what form it may take, nor how circuitous a method has been adopted to conceal its existence, the law visits upon the lender the penalty for its exaction.—Empire Trust Co. v. Coleman, 147 N. Y. Supp. 740.

86. **Vendor and Purchaser**—Binding Agreement.—A receipt for a deposit on the purchase price of a designated tract of land, which recited that the balance was to be paid upon delivery of the deed, and which was signed by the vendor, was an agreement, binding upon him, to convey the land upon receipt of the balance of the purchase price within a reasonable time.—Copple v. Aigeltinger, Cal., 140 Pac. 1073.

87.——Possession as Notice.—A purchaser of real estate in possession of a tenant is chargeable with notice of the tenant's interest.—Sassen v. Haegle, Minn., 147 N. W. 445.

88. **Wills**—Codicil.—A codicil, shown to have been made to a will not produced or accounted for and the contents of which are unknown, cannot be ingrafted on an earlier will and probated as part thereof, in absence of evidence that testator intended such codicil to be associated with the earlier will.—In re Baker's Estate, Pa., 90 Atl. 655.

89.——Construction.—The court, to determine the true meaning of a clause in a will, must look to the conditions surrounding testator at the time of the execution of the will.—Sigler v. Shelly, Ind., 105 N. E. 403.

90.——Election.—Where a surviving husband elects to take against his wife's will, the estate is to be distributed as that of an intestate.—In re Pursell's Estate, Pa., 90 Atl. 637.

91.——Legacy.—Where a life bequest in a residuary fund did not prescribe the commencement of the interest or income of the residue, the life legatee was entitled to interest or income from testator's death, and this principle is applicable whether income is earned or not.—Lawrence v. Littlefield, 147 N. Y. Supp. 760.

92.——Life Estate.—Will giving realty to testator's daughter and husband, and thereafter to her children or their heirs, charging $15,000 against the daughter's share, held to bequeath a life estate only to testator's daughter and her husband.—Backenstoe v. Hunsicker, Pa., 90 Atl. 641.

93.——Passing of Fee.—Where a sum of money is required to be paid by the devisee without words of limitation, a fee passes.—Backenstoe v. Hunsicker, Pa., 90 Atl. 641.

94.——Revocation.—To revoke a will by cancelling or tearing, the physical act and the intent to revoke must concur.—In re Wellborn's Will, N. C., 81 S. E. 1023.

95.——Right to Propound.—A contract between the sole beneficiary under unprobated will and an attorney for services for the probate of the will, for one-half of whatever the beneficiary receives under a decree or settlement, does not give the attorney a right to propound the will for probate.—Cochran v. Henry, Miss., 65 So. 213.

96.——Undue Influence.—A case of undue influence is made out where it is shown by clear and satisfactory evidence: (1) That the testator was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence.—In re Skrinsrud's Will, Wis., 147 N. W. 370.